DP Vijandran v Karpal Singh

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7-23-3-1990
LIM BENG CHOON J
22 JUNE 1993

Civil Procedure *— Costs — Conditional appearances entered by defendant — Interlocutory applications by defendant to set aside service of writ and statement of claim — Stay of proceedings pending appeal — No defence filed — Plaintiff withdrew action by notice of discontinuance — Defendant applied for costs — Preliminary objection by plaintiff — Whether defendant entitled to costs of appeal and interlocutory applications — Inherent powers of the court — Rules of the High Court 1980 O 21 r 2, O 59 r 10(1) & O 91 r 4*

On 9 January 1990, the plaintiff instituted the present action by writ and statement of claim. After entering conditional appearance by leave of court on 6 February 1990, the defendant applied by way of summons-in-chambers ('the first application') to set aside the service of the writ and statement of claim on the grounds that the writ was not served personally on the defendant and that the purported service by AR registered post was contrary to the Rules of the High Court 1980 ('the RHC'). Before the hearing of the first application, the plaintiff purported to serve on the defendant another copy of the writ and statement of claim in respect of which the defendant again with leave of court entered a conditional appearance and thereafter filed another summons-in-chambers ('the second application') to set aside the second service of the writ and statement of claim. In the hearing before the senior assistant registrar, both counsel directed their submissions only in respect of the first application. No submissions were made regarding the second application.

The senior assistant registrar dismissed the first application but made no order regarding the second application. The defendant appealed against the said decision by way of notice of appeal to judge-in-chambers and later the defendant applied for a stay of proceedings pending the hearing of his appeal. The judge allowed the defendant's application for stay with 'costs in the cause'. The Supreme Court dismissed the plaintiff's appeal against the order for stay of proceedings. On 22 June 1992, the plaintiff withdrew the action by filing a notice of discontinuance. The defendant by way of summons-in-chambers applied for costs incurred in the appeal and the interlocutory applications made by him in the suit. At the hearing of the defendant's application for costs, counsel for the plaintiff made a preliminary objection that by virtue of O 59 r 10(1) of the RHC, the defendant was entitled to tax his costs of the action without leave of court and that the defendant's application for costs was misconceived.

Held, dismissing the objection of the plaintiff with costs:

(1) The right of a plaintiff to discontinue a suit whether with or without leave of court is subject to his payment of costs in O 59

r 10(1) of the RHC. Here, the plaintiff had wholly discontinued the action and it cannot be disputed that the defendant was entitled to have his costs of the action taxed. The reason the defendant filed the summons-in-chambers for costs was because of the uncertainty as to whether the defendant was entitled to be paid for the costs of the appeal and the interlocutory applications mentioned in the present application for costs. Pursuant to O 91 r 4 of the RHC, the court has inherent powers to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. It was not improper for the defendant to move the court by way of summons-in-chambers in order to seek the determination of the court regarding his entitlement to the costs incurred in the appeal and the interlocutory applications made by him in this suit.

(2) Even assuming, without deciding that the defendant's notice of appeal to judge-in-chambers had lapsed as a consequence of the plaintiff's withdrawal of this suit, nevertheless the works in preparing and filing the said notice had already been carried out by the defendant. The defendant was entitled to costs in respect of works carried out by him in preparing and filing the notice of appeal.

(3) The court in reversing the decision of the senior assistant registrar insofar as she had refused a stay of proceedings, had ordered 'costs in the cause'. The term 'costs in the cause' might create problems when a case did not proceed to trial. It was not unreasonable for the defendant to include in his present application for costs, a prayer for the costs of the proceedings for stay.

(4) Regardless of the question whether the second application had or had not been dealt with by the senior assistant registrar, the defendant was in any case entitled to ask for the costs of preparing and filing the second application as well as to do some 'getting up' for his submission prior to the hearing of both the first and second applications.

[Bahasa Malaysia summary

Pada 9 Januari 1990, plaintif telah memulakan tindakan ini melalui writ dan pernyataan tuntutan. Selepas memasukkan kehadiran bersyarat dengan kebenaran mahkamah pada 6 Februari 1990, defendan memohon melalui saman dalam kamar ('permohonan yang pertama') untuk mengetepikan penyampaian writ dan pernyataan tuntutan atas alasan bahawa writ itu tidak disampaikan kepada diri defendan dan bahawa penyampaian melalui pos berdaftar AR yang didakwa itu adalah bertentangan dengan Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Sebelum pendengaran permohonan yang pertama itu, plaintif telah cuba menyampaikan kepada defendan satu lagi salinan writ dan pernyataan tuntutan. Sekali lagi defendan dengan kebenaran mahkamah telah memasukkan kehadiran bersyarat dan kemudiannya memfailkan satu lagi saman dalam kamar ('permohonan yang kedua')

untuk mengetepikan penyampaian kedua writ dan pernyataan tuntutan itu. Di pendengaran di hadapan penolong kanan pendaftar, kedua-dua peguambela cuma menumpukan hujah-hujah mereka terhadap permohonan yang pertama. Tidak ada hujah yang dikemukakan berkenaan permohonan yang kedua.

Penolong kanan pendaftar telah menolak permohonan yang pertama itu tetapi tidak membuat perintah berkenaan dengan permohonan yang kedua. Defendan telah merayu terhadap keputusan itu melalui notis rayuan kepada hakim dalam kamar dan kemudiannya defendan telah memohon untuk penggantungan prosiding sementara menantikan pendengaran rayuannya. Hakim telah membenarkan permohonan defendan untuk penggantungan dengan 'kos mengikut kausa'. Mahkamah Agung telah menolak rayuan plaintif terhadap perintah menggantungkan prosiding. Pada 22 Jun 1992, plaintif telah menarik balik tindakan itu dengan memfailkan satu notis pemberhentian. Defendan melalui saman dalam kamar memohon untuk kos yang kena dibayar untuk rayuan dan permohonan interlokutori yang telah dibuatnya di dalam tindakan ini. Di pendengaran permohonan defendan untuk kos, peguambela plaintif telah membuat satu bantahan permulaan bahawa mengikut A 59 k 10(1) KMT defendan berhak mentaksirkan kos tindakan ini tanpa kebenaran mahkamah dan bahawa permohonan defendan untuk kos adalah akibat salah tanggapan.

Diputuskan, menolak bantahan plaintif dengan kos:

(1) Hak plaintif untuk memberhentikan satu guaman sama ada dengan atau tanpa kebenaran mahkamah adalah tertakluk kepada pembayaran kos olehnya mengikut A 59 k 10(1) KMT. Di sini, plaintif telah memberhentikan tindakan itu secara keseluruhan dan tidak boleh dipertikaikan bahawa defendan berhak mendapat pentaksiran kosnya dalam tindakan ini. Sebab mengapa defendan memfailkan saman dalam kamar untuk kos adalah akibat ketidakpastian sama ada defendan berhak dibayar kos rayuan dan permohonan interlokutori yang disebut di dalam permohonan untuk kos sekarang ini. Mengikut A 91 k 4 KMT, mahkamah mempunyai kuasa sedia ada untuk membuat sebarang perintah seperti yang diperlukan untuk menghalang ketidakadilan atau untuk menghalang penyalahgunaan proses mahkamah. Adalah tidak salah untuk defendan memohon kepada mahkamah melalui saman dalam kamar untuk mendapat penentuan mahkamah tentang haknya kepada kos yang kena dibayar akibat rayuan dan permohonan interlokutori yang telah dibuatnya di dalam guaman ini.

(2) Sekalipun dibuat anggapan, tanpa memutuskan bahawa notis rayuan defendan kepada hakim dalam kamar telah luput akibat penarikan balik guaman itu oleh plaintif, namun usaha dalam menyediakan dan memfailkan notis itu telah dilakukan oleh defendan. Defendan berhak mendapat kos berkenaan dengan usaha yang dilakukannya dalam menyediakan dan memfailkan notis rayuan itu.

A (3) Mahkamah ketika mengakaskan keputusan penolong kanan pendaftar setakat beliau enggan menggantungkan prosiding, telah mengarahkan 'kos mengikut kausa'. Terma 'kos mengikut kausa' boleh mengakibatkan kerumitan apabila suatu kes tidak sampai ke perbicaraan. Adalah bukan tidak berpatutan untuk defendan memasukkan di dalam permohonannya sekarang ini satu permohonan untuk kos prosiding penggantungan.

B (4) Tanpa mengira soalan sama ada permohonan yang kedua telah atau tidak diputuskan oleh penolong kanan pendaftar, defendan dalam apa keadaan sekalipun berhak meminta kos menyediakan dan memfailkan permohonan yang kedua itu serta membuat sedikit sebanyak 'getting up' untuk penghujahannya sebelum pendengaran kedua-dua permohonan pertama dan kedua.]

C

Notes

For cases on costs in an appeal, see 2 *Mallal's Digest* (4th Ed) paras 595–598.

D For a case on costs in an interlocutory proceeding, see 2 *Mallal's Digest* (4th Ed) paras 645.

Cases referred to

1 *Pahang Consolidated Co Ltd v State of Pahang* [1933] MLJ 247; [1932] 1 PCC 391 (refd)

E 2 *Foo Loke Ying & Anor v TV & Broadcasting* (unreported) (refd)

3 *Tay Lay Soon v Kam Mah Theatre Sdn Bhd* [1992] 2 MLJ 434 (refd)

4 *JT Stratford & Son Ltd v Lindley & Ors (No 2)* [1969] 3 All ER 1122; [1969] 1 WLR 1547 (refd)

F

Legislation referred to

Rules of the High Court 1980 O 59 r 10(1)

MS Murthi (*Murthi & Partners*) for the plaintiff.

G *Karpal Singh* (*Karpal Singh & Co*) in person.

Cur Adv Vult

Lim Beng Choon J: This is an application of the defendant made by way of a summons-in-chambers dated 14 August 1992 in which he is asking for

H costs in respect of the various interlocutory applications made prior to the plaintiff's withdrawal of the suit unilaterally by filing a notice of discontinuance on 22 June 1992. The several items of costs asked for by the defendant have been set out in the said summons-in-chambers which I shall be re-producing presently.

I The background facts which give rise to the aforesaid application are these. On 9 January 1990, the plaintiff instituted this civil suit by a writ of summons accompanied by a statement of claim. The reliefs asked for were: (i) damages for slander and/or libel including defamatory words published or spoken by the defendant of the plaintiff; and (ii) an injunction to restrain

the defendant whether by himself, his servants or agents or otherwise howsoever, from further publishing the said or any similar defamatory words defamatory of the plaintiff. After filing his memorandum of conditional appearance by leave of court on 6 February 1990, the defendant applied by way of a summons-in-chambers dated 8 February 1990 for an order:

(a) affirming that the purported service or service of the writ of summons and statement of claim on the defendant by AR registered post or post on or about 2 February 1990 be set aside;
(b) declaring that the writ had not been duly served on the defendant; and
(c) directing that the plaintiff do bear and pay all the costs of and incidental to this application.

This application was supported by an affidavit affirmed by one, Ganesan s/o Thanapalan ('Ganesan'), a clerk attached to the law firm of the defendant known as Messrs Karpal Singh & Co on 5 February 1990, in which it was confirmed, inter alia, that the writ with the statement of claim in this suit was served on the defendant by AR registered post on 2 February 1990. Another affidavit affirmed by the defendant himself on 8 February 1990 was also filed in support of the application in which the assertion of Ganesan was further confirmed. The defendant went on to assert in his affidavit that the writ should be served personally and not by AR registered post or by post. Hence the purported service or service of the writ was contrary to the Rules of High Court 1980 ('the RHC') and he prayed for an order in terms of his application. Before the application of the defendant dated 8 February 1990 was heard, the plaintiff purported to serve on the defendant another copy of the writ and statement of claim on 11 December 1990 which the defendant accepted under protest and without prejudice to his right to apply to set aside the purported service of the said writ. In respect of the second service of the writ, the defendant again, with leave of court, entered a conditional appearance on 15 December 1990. This was followed by the defendant filing another summons-in-chambers on 27 December 1990, in which he applied for the following orders (which translated in English read as follows):

(1) an order directing that the service of the writ and statement of claim on the defendant on 11 December 1990 be set aside;
(2) a declaration that the writ had not been properly served on the defendant; and
(3) an order that the plaintiff do bear and pay the defendant the costs of the application and all incidental costs inclusive of the costs incurred in obtaining leave of court to enter conditional appearance.

Both the summons-in-chambers of the defendant dated 8 February 1990 and 27 December 1990, respectively, came on for hearing before the senior assistant registrar ('the SAR') on 27 February 1991, but the hearing was postponed to 17 July 1991 and again to 10 October 1991. At the hearing of the two summons-in-chambers on 10 October 1991, the defendant appeared in person to argue the case on his own behalf while the plaintiff was represented by Mr Murthi. From the notes of proceedings recorded by the

SAR in the court file, it is clear that both counsel directed their respective submissions only in respect of the defendant's application made by way of summons-in-chambers dated 8 February 1990. No submissions were made regarding the summons-in-chambers dated 27 December 1990 and I have no doubt that the reason for this omission is that as the issues of law and fact in this summons were the same as those in the former summons, both counsel were of the view that the SAR would be able to give her decision on both the summonses notwithstanding the omission. On 11 October 1991, the SAR pronounced that, 'Saya tolak permohonan defendan (encl 7)'. Enclosure 7 of the court file relates to the summons-in-chambers of the defendant dated 8 February 1990. This pronouncement of the SAR confirms that she had made no decision regarding the defendant's application of 27 December 1990. I mention this because the parties are disputing as to the extent of the decision of the SAR made on 11 October 1991. I should also mention that in my judgment dated 27 November 1991 given in respect of the application of the defendant for a stay of proceedings pending the hearing of his appeal against the decision of the SAR dated 11 October 1991, I wrongly mentioned that the SAR dismissed 'the defendant's *applications* to set aside the service of the writ and refusing to grant the defendant a stay of the proceedings ...'. Mr Karpal Singh immediately wrote to me on 28 November 1991 pointing out the error and explained that the SAR only decided on the application of the defendant dated 8 February 1990 and as regards to the application dated 27 December 1990 of the defendant to set aside the second service of the writ, the SAR did not make any decision and instead she adjourned the same pending the outcome of the appeal in relation to her decision on the first mentioned application of the defendant. The letter was carbon copied to Mr Murthi who by his letter of 5 December 1991 asserted that, 'The senior assistant registrar dismissed encl 22 (the application of the defendant dated 27 December 1990) on account of the dismissal of encl 7'. Be that as it may, the error made in my aforementioned judgment is not in issue in the present case since: (i) the defendant in his notice of appeal against the SAR's decision has confined his appeal only 'against the decision of the SAR given on 11 October 1991 dismissing the defendant's application (vide summons-in-chambers dated 8 February 1990) (encl 7) and refusing to grant the defendant a stay of filing of the statement of defence pending appeal herein ...'; (ii) the plaintiff has not deemed it fit to raise any objection against the said notice of appeal nor has his counsel raised the matter at the hearing of the defendant's appeal; and (iii) the ratio decidendi of my judgment in allowing the stay was that if the stay was not granted and the defendant was required to file his defence in compliance with the order of the SAR, the very purpose of his application to set aside the writ vide the summons-in-chambers dated 8 February 1990 would become useless and would render his appeal against the SAR's decision an exercise of futility. It follows therefore that the error I made in my judgment as stated above does not form part of the subject matter of the appeal of the defendant against the SAR's decision neither does it play a crucial part in my judgment. The error has in any case been corrected before the hearing of the notice of appeal.

From the above discussions, there should be no doubt that the SAR had in her decision of 11 October 1991, dismissed only the defendant's application of 8 February 1990. She made no order regarding the defendant's application dated 27 December 1990.

Reverting to the defendant's application for costs, the prayers asked for by the defendant are as follows:

(1) the plaintiff do pay the defendant the taxed costs of the appeal to judge-in-chambers pursuant to the notice of appeal to judge-in-chambers dated 15 October 1991 (encl 31) and the taxed costs of the summons-in-chambers dated 8 February 1990 (encl 7);
(2) the plaintiff do pay the defendant the taxed costs of the proceedings relating to the application for a stay of proceedings heard before the Honourable Justice Dato' Lim Beng Choon on 25 October 1991;
(3) the plaintiff do pay the taxed costs of encl 22 (summons-in-chambers dated 27 December 1990); and
(4) the suit herein be dismissed with costs to be taxed on the ground appearing in the affidavit of Karpal Singh affirmed on 13 August 1992.

In support of this application for costs, the defendant in his affidavit affirmed on 13 August 1992 deposed in para 10 thereof the following statements:

> I respectfully state, having regard to the facts and circumstances, the plaintiff cannot unilaterally discontinue the suit without having the costs of the various pending applications resolved. It would amount to an abuse of process to do so. Order 21 r 2(1) of the Rules of the High Court 1980 is, clearly, not applicable having regard to the facts and circumstances prevailing. The honourable court has inherent power under O 92 r 4 to prevent injustice or an abuse of process of the honourable court.

At the hearing of the defendant's application for costs, Mr Murthi firstly submitted on the scope of certain rules of the RHC. Thus, he argues that under O 21 r 2, the plaintiff is entitled to withdraw this suit without leave of court within 14 days after the filing of the defence and since in the present case no defence has been filed, the withdrawal of this suit is immune from any challenge. Mr Karpal Singh, on the other hand, submits that O 21 r 2 would only apply in cases where there is no interlocutory application. The said order could not therefore apply to this suit where there had been several interlocutory applications made and where there was also an appeal by the plaintiff to the Supreme Court against my decision in allowing a stay of the proceedings. It was only after the Supreme Court had dismissed the plaintiff's appeal that he withdrew this suit. With due respect to Mr Karpal Singh, I think the contention of his is misconceived simply because if he is seriously contending that the plaintiff has no right to discontinue this suit made under O 21 r 2 one may ask as to why did he not apply to this court to challenge the notice of discontinuance which was served on him on 23 June 1992.

Indeed by his letter of 3 July 1992, he appeared to accept the said notice without objection and merely indicated that he would be proceeding with all pending applications and would be asking for costs. Furthermore, the

A expressed wording of O 21 r 2 abjure any suggestion that the said rule is applicable only in cases where there is no interlocutory applications made in a suit prior to its discontinuance. I cannot therefore accede to the contention of Mr Karpal Singh for should I do so, I would not be construing the scope of the said rule according to the expressed words but instead I would have to put in words in order to arrive at a construction conformable with the contention of the defendant. Needless to say that such an exercise I cannot do — see *Pahang Consolidated Co Ltd v State of Pahang*[1] and the recent Supreme Court case of *Foo Loke Ying & Anor v TV & Broadcasting*.[2] Be that as it may, the right of a plaintiff to discontinue a suit whether with or without leave of the court is subject to his payment of costs in O 59 r 10(1).

In his submission regarding the scope of O 59 r 10(1) of the RHC, Mr Murthi argued that by virtue of the said rule, the defendant is entitled to tax his costs of the action without leave of court. The present summons-in-chambers of the defendant for costs is therefore misconceived. Now, O 59 r 10(1) reads as follows:

> Where a plaintiff by notice in writing and without leave either wholly discontinues his action against any defendant or withdraws any particular claim made by him therein against any defendant, the defendant may tax his costs of the action of his costs occasioned by the matter withdrawn, as the case may be, and, if the taxed costs are not paid within 4 days after taxation, may sign judgment for them.

It is to be noted that the said rule provides two circumstances in which a defendant can proceed to tax his costs without leave of court, namely: (i) when the plaintiff wholly discontinues his action; and (ii) when the plaintiff withdraws any particular claim made by him against the defendant. In the present case, the plaintiff has wholly discontinued the action and it cannot be disputed that the defendant is entitled to have his costs of the action taxed. Be that as it may, the reason for the defendant in filing this summons-in-chambers for costs is, as can be seen in the prayers sought, because of the uncertainty as to whether the defendant is entitled to be paid for the costs of the appeal and the interlocutory applications mentioned in the present application for costs. It is for this reason that the defendant deems it appropriate to have the matter settled by this court. It is true that the matters can be argued at the taxation stage before the SAR, but the SAR's decision on the matter is subject to review by this court. In the circumstances of this case, I have no doubt in my mind that any decision made by the SAR would be brought before me for a review of her decision and this would certainly increase the costs and would be an unnecessary waste of time. In any event, pursuant to O 91 r 4, the court has inherent powers to make *any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.* The scope of O 91 r 4 and the inherent powers of the court is neatly explained in the case of *Tan Lay Soon v Kam Mah Theatre Sdn Bhd (Malayan United Finance Bhd, Intervener)*[3] in these words (at p 446):

> ... In so holding, the Court of Appeal had followed *Smith v Peters* (1875) LR 20 Eq 511 in which it was held that the court has jurisdiction to make *any* interlocutory

order which is reasonably asked as ancillary to the administration of justice at the hearing of the cause.

The cases of *Astro* [1982] 3 All ER 335 and *Smith v Peters* [1985] 2 MLJ 45, were cited with approval by the Federal Court in *TR Hamzah & Yeong Sdn Bhd v Lazar Sdn Bhd* wherein reference was also made to the provisions of O 92 r 4 which reminds the High Court of its inherent powers to make *any orders* as may be necessary to prevent injustice or to prevent an abuse of the process of the court. (Emphasis supplied.)

For the above reasons, I am satisfied that it is nothing improper for the defendant to move this court by way of the summons-in-chambers dated 14 August 1992 in order to seek the determination of the court regarding his entitlement to the costs incurred in the appeal and the interlocutory applications made by him in this suit.

I shall now turn to Mr Murthi's arguments concerning the reliefs prayed for in the present application of the defendant for costs.

In dealing with prayer 1 of the summons-in-chambers dated 14 August 1992, Mr Murthi suggested (if I understand him correctly) that as the plaintiff had discontinued this suit, the notice of appeal of the defendant to the judge-in-chambers against the SAR's decision dismissing his application to set aside the writ and also refusing the stay of this action, should also lapse. In any case, so said Mr Murthi, the plaintiff might well be able to convince the court that the SAR's decision was correct in which case the court should dismiss the defendant's appeal with costs to the plaintiff. With respect to the learned counsel, his contentions to my mind are completely irrelevant. Here, the defendant is asking for the taxed costs in respect of works done by him in his capacity as solicitor acting on his own behalf in preparing and filing the notice of appeal against the SAR's decision of 11 October 1991. That being the case, it cannot be disputed that even assuming, without deciding that the notice of appeal had lapsed as a consequence of the plaintiff's withdrawal of this suit, nevertheless, the works in preparing and filing the said notice had already been carried out by the defendant acting as his own advocate and solicitor. That being the case, the defendant is, to my mind, entitled to ask for costs in respect of the works carried out by him in preparing and filing the notice of appeal. It follows therefore that there is nothing improper on the part of the defendant in asking for the relief as set out in the said prayer 1.

With regard to prayer 2, Mr Murthi conceded that the defendant was entitled to the costs prayed for in prayer 2 but he said that the defendant had 'no right to ask for another order'. I regret to state that I cannot agree with the contention of Mr Murthi. It is to be noted that in reversing the decision of the SAR in so far as she had refused a stay of the proceedings, I ordered 'costs in the cause'. The term 'costs in the cause' may create problems when a case did not proceed to trial — see for instance *JT Stratford & Son Ltd v Lindley & Ors (No 2)*.[4] That being the case, it is again not unreasonable for the defendant to include prayer 2 in his application for costs.

As to prayer 3, Mr Murthi suggested that that prayer was incompetent, meaning that the defendant was not entitled to ask for the relief prayed for in prayer 3 on the ground that the summons-in-chambers referred to in

prayer 3 was still with the SAR and had not been heard yet. It is rather amusing to note that this contention of Mr Murthi is inconsistent with his earlier insistence made to the defendant that the SAR had dismissed the defendant's summons-in-chambers dated 8 February 1990 as well as his summons-in-chambers dated 27 December 1990. Be that as it may, I regret to have to say that regardless of the question of whether the summons-in-chambers of 27 December 1990 had or had not been dealt with by the SAR, the defendant is in any case entitled to ask for costs of preparing and filing the said summons as well as to do some 'getting up' for his submission prior to the hearing of both, and I repeat both, the said summonses before the SAR which finally took place on 10 October 1991 after two postponements. For the above reasons, the objection of the plaintiff is dismissed with costs and the present application of the defendant made by way of summons-in-chambers dated 14 August 1992 is to be fixed for continued hearing by this court.

Order accordingly.

Reported by Yap Foo Ken